

**Letter of Findings: 04-20120615**  
**Sales Tax**  
**For the Years 2009 and 2010**

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**ISSUE**

**I. Sales Tax – Exemption.**

**Authority:** IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-5-39; IC § 6-2.5-8-8; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Retail Merchant ("Retail Merchant") protests the imposition of sales tax on the sale of fireworks it stated were sold to an exempt entity.

**STATEMENT OF FACTS**

Retail Merchant is a sole proprietor who owns and operates a seasonal fireworks business. Retail Merchant's sales are both wholesale and retail. The Indiana Department of Revenue (Department) conducted a sales and use tax audit of Retail Merchant for the years 2009 and 2010. For the years at issue, Retail Merchant was a seasonal filer for sales and use tax purposes. The Department's audit found that Retail Merchant had made taxable sales and did not have a record of exemption certificates for any of those sales. Therefore, pursuant to the audit, Retail Merchant was assessed additional sales tax, penalty and interest for the periods. Retail Merchant protested the assessment of additional sales tax. There was also a small assessment of additional use tax which Retail Merchant did not protest. An administrative hearing was held on Retail Merchant's protest and this Letter of Findings ensues. Additional information will be provided as necessary.

**I. Sales Tax – Exemption.**

**DISCUSSION**

The Department's audit assessments were made using the best information available to the Department. According to the Department's audit summary, dated June 6, 2012, Retail Merchant did not retain sales receipts or invoices for cash sales, and did not maintain receipts for credit sales outside of the account statement/transaction listing from his financial institution. Retail Merchant did not have register tapes or other documentation to support actual sales numbers. Retail Merchant did maintain invoices from inventory purchases. The Department's auditor used vendor invoices to total the inventory purchases for each year in the audit period. The auditor then reviewed industry statistics to determine the average percentage of total sales that represents inventory purchase costs. After removing Retail Merchant's wholesale, exempt, and at-cost transactions, the auditor determined the amount of inventory sold in retail, marked-up, taxable sales. This amount was multiplied by the industry percentage previously identified to estimate total retail sales (after adding in the at-cost sales as well). The auditor subtracted from that total the taxable sales already reported by Retail Merchant to arrive at the estimated additional taxable sales and made adjustments accordingly.

As a threshold issue, although a statute that imposes a tax is strictly construed against the State, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

In accordance with IC § 6-2.5-2-1(a), a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. IC § 6-2.5-2-1(b) states:

The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.  
(Emphasis added).

The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose."

Therefore, Retail Merchant has a duty to collect and remit sales tax on its sales of tangible personal property. When Retail Merchant fails to collect and hold the taxes in trust for the state, Retail Merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales.

[45 IAC 2.2-8-12](#)(d) cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." Therefore, if the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden on Retail Merchant of proving the transaction was exempt becomes measurably more difficult.

Accordingly, it is Retail Merchant's responsibility to retain the documentation that supports the amounts it used to determine tax owed.

At the initial hearing and in a telephone follow-up to the hearing, Retail Merchant made two claims in the context of its protest: (1) Retail Merchant stated that it had exempt sales to a local church that purchased fireworks from him every year, and (2) that at least for some of the years at issue, Retail Merchant had high excess inventory at the end of its season and therefore using the inventory numbers as a starting point was unfair. The hearing officer provided Retail Merchant with a special AD-70 form that would allow Retail Merchant to obtain the church's exemption information and signature belatedly. The hearing officer also asked Retail Merchant to substantiate its claim regarding the unused inventory.

After the hearing, Retail Merchant sent in the properly filled out AD-70 forms from the church. However, Retail Merchant failed to provide invoices or anything from the church showing the dollar amounts associated with these exempt transactions. Short of another audit, the Department can ascertain neither that these transactions were in the assessment nor for what amounts.

As for its contentions regarding starting and ending inventory for the years at issue, Retail Merchant did not provide any additional documentation subsequent to the hearing.

Given all of the above, Retail Merchant has not carried its burden to overcome the Department's proposed assessment.

#### **FINDING**

Retail Merchant's protest of the assessment of sales tax is respectfully denied.

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